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COMMENTS ON IAA (HAGUE) REGULATIONS
Re: State/AR-01/96

BY:
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The Russian Adoption Handbook
The Chinese Adoption Handbook

Preliminary Remarks

1. The State Department should make all electronic comments available on its web site as well as the responses by the Department. Having comments and responses unavailable to the adoption community perpetuates the very fog of secrecy that these regulations seek to dispel. It has been a great benefit to the adoption community for the Acton Burnell web site to post the electronic comments filed in 2001. The Department and Acton Burnell should be commended for having done this and they just need to continue.

2. The Department should be given credit for allowing public comment in the initial stages of developing these regulations. It would have been a serious error to develop them without the input from the adoption community. The Department should also be credited for trying to raise the bar in regard to international adoptions. Even in 2003 I have heard stories of parents being shown children different than what they were first told, asked for more money in-country, and finding medical information once in-country that was either known to the agency or would have been known if the agency had done a minimum of research.

3. One aspect of this entire process that needs mentioning is that these regulations and the Hague Convention are inapplicable to 90% of all international adoptions. The Hague Convention has not been adopted by most sending countries. Thus, the discussion with the Department in 2001 regarding these regulations was by necessity not focused so much on the *current* problems that American's face when adopting internationally, but rather on how to implement a 1993 convention created by Europeans (with American input). This convention was based on problems with Romanian adoptions in

1990-91. Now, almost 11 years after the Convention, the international adoption landscape has changed dramatically, yet the focus is not on *current* problems and their solutions, but on old ones.

China, which provides a fourth of all foreign adoptions each year, has a central adoption agency that has a firm control over international adoption. Russia, which provides another fourth, has somewhat of a control. Ukraine also has a central authority, even though their process is not as well run. All of this is new since 1993, yet it was never discussed how these proposed regulations would fit into the current procedures of the majority of sending countries, if these countries ever accept the Convention.

Some new problems were discussed in the 2001 comments and hearing. The Department took the complaint issue seriously and has proposed a solution. It was unable to address the medical information issue, as it did not want to get involved diplomatically in resolving the issue with the sending countries. This is unacceptable, and the Department should address this issue with sending countries independently of the IAA. There are many solutions to the medical information problem.

4. The Department needs to address whether these regulations would apply to the three most common forms of adoption arrangements.

a.) where a US adoption agency is permitted by the sending country to work through another US agency. This occurs in almost all countries.

b.) where a US adoption agency works through a company that provides "facilitation" services. Facilitation service is generally defined as help with in-country travel arrangements, the communication of information on a child, translation of documents, arranging meetings with foreign officials and judges, filing of foreign paperwork, etc. A facilitation company does not work directly with a parent except when the parent is overseas, but rather works with the US adoption agency. This occurs most often in Russia and Kazakhstan.

c) Where a US adoption agency is required by the sending country to work with a welfare agency based in that country. This occurs in Korea.

The Department should look at the top 10 sending countries for 2003 and specifically outline the methods by which an US adoption agency assists a parent to adopt in that country and what part of that arrangement would be covered. Otherwise, agencies and parents cannot tell from these very general statements in the regulations whether a method is covered. Details and granularity are easier to deal with than generalizations, as it forestalls confusion and subsequent clarifications.

Subpart A—General Provisions
§ 96.1 Purpose.

The Department needs to clarify in its "adoption services" definition that simply assisting a sending country's public body does not fall under the definition of (A) or (B). For example, a person working full or part time for a US adoption agency might assist the adoption by obtaining a birthparent's signature on a relinquishment form or gathering information so the child can be placed on the sending country's database. In Russia a birthparent has to sign at least two relinquishment forms unless the child is "abandoned." The first form is the relinquishment of the child to the state and consent to adopt. Much later, the birthparent has to be tracked down and asked to sign a second form consenting to a foreign adoption. Many times in Russia a child languishes in an orphanage because the Russian social workers are too overworked to get this second form signed. An agency's facilitator or translator sometimes helps with the process. The actual adoption is handled through the regional Ministry with the consent of the Director and Judge, but in a process that takes so much paperwork it is "in the best interest of the child" if someone can help. The Department must take into account a country's practical difficulties.

Another troublesome problem with the definition in (A) is "identifying a child for adoption and arranging an adoption." This is a very ambiguous phrase. Does this mean if a child's picture or video or medical information is shown to a parent in the US by an agency, then the agency must comply with these regulations? Yet

an agency that is working in a two-trip region or otherwise does not pre-identify but sends the parents over to choose the child does not fall under these regulations?

Again, the real problem with the Convention, IAA and these regulations is that they do not match up with what is really going on.

The Department describes a situation where a lawyer might assist obtaining signatures. These Regulations do not govern a foreign lawyer's practice. Nor can they govern a US lawyer's practice inasmuch as a US lawyer's practice is governed and controlled by a state's judiciary. The Department needs to retreat from this position. It should be pointed out to the Department that the IAA makes no definitional remarks regarding what are "legal services" and the Department should not attempt to create any given the strong state interest.

The IAA and the Department have reversed the definitional terms for "disruption" and "dissolution." I researched these terms extensively and how they were used prior to writing a chapter on disruption. In a domestic adoption researchers generally are split on how they use the terms. Domestic adoptions usually have a period where the adopting family has custody of a child, before finalization. In a domestic adoption some professionals use the phrase "disrupting the placement" in these situations. In an international context, except for Korea, the adoption is generally final at the same time as custody. In an international adoption, everyone used the term "disrupting the adoption" for a post-adoption situation and "dissolution" for pre-adoption.

The reason the IAA and Department confuses the terms is because input came from people familiar with domestic adoptions, but not international. This lack of experience was apparent at the 2001 hearing.

Subpart B
96.6 Performance criteria for designation as an accrediting entity et. al.

No comments

Subpart C—Accreditation and Approval Requirements for the Provision of Adoption Services

§ 96.13 Activities that do not require accreditation, approval, or supervision.

(a) *Home studies and child background studies.*

It is unfortunate that the Department wants home studies to be approved by an approved agency. Every little nitpick requirement costs adoptive parents money. Lots of money. A home study in this country costs between $1000 to $3000. How much will they charge parents and how much of a delay will it mean to have the home study "approved."

A home study takes about 3 months to write then it must be approved by the state then it must be filed with the INS/BCIS/USCIS. The home study agency has normally completed many international home studies and knows the requirements just as well as the adoption agency. Further, many times the adoption agency is consulted by the home study agency and the parents if there is a particular issue. What is to be gained by creating a requirement that simply adds to the cost, but adds nothing else?

The IAA needs a technical amendment to eliminate this provision.

(d) *Prospective adoptive parent(s) acting on own behalf.*

In the introductory section to the regulations at page 54079 the Department makes it clear that adoptive parents are not allowed to adopt independently without complying with the IAA, Convention and these regulations. This comes as a great shock to most adoptive parents who consider this position a cave-in by the Department to the big adoption agencies.

The Department bases its decision on the fact that the IAA provision exempting independent adopters falls under Title II regarding accreditation. The department believes this limits the exemption to just the accreditation procedures and not to any and all procedures. The Department's interpretation is unnecessarily narrow and does not make a great deal of sense. What does the Department plan to do, refuse to give an independent adopter's child a visa unless the parent can prove what? If an independent

parent does not have to be accredited, yet the Department requires the parent to essentially follow accreditation requirements, then where is the exemption? The Department needs to seriously rethink its position.

§ 96.14 Providing adoption services using supervised providers, exempted providers, public bodies, or public authorities.

I commend the Department for attempting to make the adoption agency responsible for the foreign facilitator, but many agencies use exculpatory clauses in their contracts. Will these clauses and contracts be illegal under these regulations? Take a look at the cases at 977 F.Supp. 56, 741 A 2nd 1035 and 138 F.3d 1201 and see if this provision holds up under contractual limitations.

Subpart D—Application Procedures for Accreditation and Approval

No comments.

Subpart E—Evaluation of Applicants for Accreditation and Approval

§ 96.26 Protection of information and documents by the accrediting entity.

The desire to keep information confidential is laudable. However, the need for public disclosure of Complaint Registry information is also desirable and necessary. Parents need to know what the complaint was and the disposition by the Accrediting Entity/Department. It is very likely, indeed almost a certainty that the Department will not agree that a complaint rises to a serious level, yet a parent will. Parents have a lot less tolerance. Parents are more than capable of deciding whether they should hire an agency that has a certain complaint. Voting with their feet and pocketbooks is the best way parents can change the adoption industry's behavior. But in order to do that, they need enough information from the complaint. They may not need the name of the complainant or her child, but they do need the name of the agency, the name of the foreign country facilitator, the name of the region or city, the gist of the complaint and the response of the agency.

§ 96.27 Substantive criteria for evaluating applicants for accreditation or approval.

I am concerned that the Department/Accrediting Entity may not take into account the past history of agencies. The Department seems solely focused on whether an agency can meet these regulations and not on past performance. There are at least 100 agencies that assist with adopting from China/Korea/Russia/FSU. Many have worked in these countries for years. Why ignore the behavior of these agencies when it was their bad behavior and practice that caused Congress to enact the IAA in the first place.

If an agency left a parent stranded in Kazakhstan, that should be told. If an agency promised a child to a parent, yet when the parent went to meet that child was presented with another that should be considered. If an agency did not detail all expenses and suddenly the parents were asked to pay an extra $1000, *once they traveled overseas*, that behavior should be considered. If an agency through intention or gross negligence undertook no due diligence in respect to a child's medical report and instead parents discovered easily known conditions once they were overseas, that should be considered. The later are situations where TB exposure or syphilis are in the child's medical record, yet did not make it into the English translated medical summary given to the parents in the U.S. Every situation I have described, except for the Kazakhstan episode, occurred in 2003.

The Department should allow parents the opportunity to comment on an agency's application and to tell their story to the accrediting entity. Past performance can be a predictor of future compliance and should be an element in the accrediting entity's decision. There is no point in letting bad apples hurt the good agencies. Accreditation should actually mean something and should be a reward. It should not just reflect whether you have checked the box next to having a social worker with a Master's Degree. That has little to do with whether an agency is honest, has good connections overseas, and can deliver what it promises.

96.35(b)(5) seems to address the issue, yet it relies solely on agencies to volunteer the information about past complaints. If an agency is dishonest, there is no way an accrediting entity will know. The Department should allow parents to send their past complaints to the accrediting entity for its consideration in making the accreditation decision.

As the Department continually repeats, an accreditation decision is nonreviewable, while an agency once accredited, has all kinds of appeal rights. It is better to bar a bad apple from the beginning, than be unable to stop an agency's practice once it is accredited.

Another idea is to allow other agencies to send comments to an accrediting entity on any past unethical situations it encountered with another agency. False accusations will have to be screened.

Subpart F—Standards for Convention Accreditation and Approval

§ 96.36 Prohibition on child buying.

I assume that the Department is not prohibiting the required donation to the orphanage or state welfare organization? Both China and Russia generally require a donation.

§ 96.37 Education and experience requirements for social service personnel.

The intent of this section is laudable, but needs some work. By requiring master's degrees, it substitutes form over substance. The section contains a grandfather provision for supervisors, and this provision contains the solution. Experience in intercountry adoptions should always be allowed to substitute for having a master's degree, which quite frankly, has little to do with helping a parent succeed.

Parents do not call an agency asking about adoption. They call an agency to find out when their referral is coming, when are they traveling, how much money should they bring, or what to do about a paperwork problem with the INS/BCIS/USCIS.

Why does the Department think a social worker with a master's degree has more information about these issues than someone who lived in Russia for 5 years, worked as a missionary, speaks the language, etc.

The Department has tried to take the domestic adoption scheme and fit intercountry adoption into it. It doesn't always work and this is one section where that methodology fails. It is at the home study level that adoption issues and questions are asked and answered, not at the adoption agency level. The two are separate. I do not think the Department understands that. The same comments apply to section 96.38. This section seems to require an adoption

agency to provide a service for which the home study agency generally provides. I question whether the Department is not mixing the two functions based on confusion.

A social worker with a degree is very useful in preparing a home study and in post-adoption problems. When a parent calls up with an attachment issue, the social worker needs to have a directory of attachment therapists at hand to refer the parent.

Parents are routinely sent packets of information by their home study and adoption agency on foreign adoptions and the risks. Everyone gets the same articles written by Drs Aronson, Johnson and Jenista. There are attachment articles and articles on SID, RAD, etc. Unlike 10 years ago when the Convention was written, there is now plenty of information, if the parents will read it.

What are missing are agency people with real experience. An agency employee, whether supervisor or not, who has adopted internationally, has a lot more valuable advice for a parent, than a social worker with a degree who doesn't speak the language, or has never lived in the country, or never adopted internationally.

The same grandfather exception for real adoption experience in (b)(5) should be made permanent for all employees of adoption agencies.

§ 96.39 Information disclosure and quality control practices.

I want to commend the Department for requiring agencies to provide a copy of their contract when asked. Some agencies have demanded an application fee of $200 before they send you a contract. The Department should actually look at several contracts and establish a permitted or prohibitive list of clauses so there is uniformity and parents can make an apples to apples comparison.

I also commend the Department for eliminating exculpatory clauses (see my comments to 96.14), and for requiring information on disruptions/dissolutions.

§ 96.40 Fee policies and procedures.

I commend the Department for this section. I want to comment on parents' taking a couple of thousand dollars overseas, as this seems to be a hot button for some people. Most sending countries do not take Traveler's checks and credit cards are only useful in a few

hotels. The U.S. Embassy also only takes cash for the $325 visa for your child. So you have to take money with you. In 1998 there was no way to transfer money to Russia. Their banking system was destroyed. This could happen again. So I think the Department has done the correct thing by requesting agencies to minimize the large sums yet still giving agencies, particularly smaller ones, flexibility in dealing with uncertain foreign monetary situations.

§ 96.41 Procedures for responding to complaints and improving service delivery.

The Department excludes post-adoption parents from this complaint procedure. This is wrong and guts this entire section. The Department has written this section to only allow pre-adoptive parents to complain. That is ridiculous. Only when parents have returned with their child are they likely to voice a complaint about what happened in-country. Obviously they cannot complain about something in-country until they return. Yet this section does not allow for that.

Further, parents are reluctant to complain until they are home with their child. This section would exclude most parents and needs to include post-adoptive parents.

§ 96.47 Preparation of home studies in incoming cases.

The Department should use this section to streamline the requirements for home studies. In particular, the Department should eliminate the need for disclosure of any misdemeanor over 10 years old that does not involve abuse. The INS/BCIS/USCIS has been going to ridiculous extremes in bothering parents about teenage and college misdemeanors that happened 20, even 30 years ago. I have been told that this is so they can get the file off their desk by telling the parents they need to see the 30-year old court file. The Department should use these regulations to put a stop to this bureaucratic behavior by its sister agency. Parents are not the enemy and should not be treated as such by their own government, yet that is what is happening. This section on criminal background checks needs to be changed.

The provision in (6)(d) also needs to be changed. Many countries have sensitivities, which the U.S. no longer has, which could cause a parent to be rejected. In the U.S., an old misdemeanor is not grounds for rejection, even where the INS puts the parent through the wringer as noted above. Eventually the parent will be

approved. Yet some countries will reject an applicant. In those cases one home study outlining the offense is prepared for the INS and a second one without the offense is prepared for the foreign country. This is also true for certain medical conditions that in the U.S. are not disabilities. Again, two separate home studies are sometimes prepared.

This provision requiring that the home study sent to the agency be the same one sent to the foreign country eliminates the discretion by the home study preparer and adoption agency in deciding whether the parent is at risk of rejection in a particular foreign country because of the disclosure. This provision could eliminate a segment of Americans as parents, particularly in the disabled community. The Department needs to rely on the judgment of the home study and adoption agencies and quit trying to micromanage everything.

§ 96.48 Preparation and training of prospective adoptive parent(s) in incoming cases.

I commend the Department for emphasizing training and education. I also like the flexibility given to parents to opt out if they have already adopted. Many parents adopt more than once. There is no sense making a blanket requirement that they waste their time learning stuff they already know.

§ 96.49 Provision of medical and social information in incoming cases.

I commend the Department for trying to reach a compromise on the issue of medical information. The opportunity of a parent to obtain their own translation is a point that is continually raised in the adoption community. The Department, in its diplomatic capacity could go further. First, it could hold a high level meeting with the sending countries and ask them to provide a standard form of medical questions. Several agencies have such a standard form and it runs into pages of information. The Department should adopt a standard form and make it a requirement. The Department should also require that if a parent requests an in-country doctor examine their child, that the agency must make the arrangements. Further, that if a parent wants to conference in a U.S. doctor with the orphanage doctor, the agency must make the arrangement. Many parents currently use both of these methods.

The Department needs to be more proactive on the medical issue with their counterparts.

I really don't understand the one-week limitation in (k) It is way too short. A parent cannot have an IA doctor look at a referral tape and medicals, arrange for an in-country doctor to see the child, or have questions relayed to the facilitator then get answered in a week. I really don't know what the Department was thinking. Parents sometimes take up to two months before making a decision on a child that has red flags. This requirement should be more like 3 weeks and should extend the time if the parent is waiting on the agency to get answers back from the facilitator. It's not like these orphanages have email. Some barely have heat.

§ 96.50 Placement and post-placement monitoring until final adoption in incoming cases.

§ 96.51 Post-adoption services in incoming cases.

The term "incoming case" is not defined. If it means a child coming into the U.S under an IR-4, then perhaps these regulations make sense i.e. a Korean escort case. These regulations are drawn from domestic adoptions. They have no relevance to the IR-3 visa procedures in China or Russia and the FSU. It simply is not the way it works. In Russia, parents are thrilled if they are allowed to keep the child in their hotel while the 10-day appeal period passes. In Kazakhstan the period is 2 weeks. These regulations seem to apply to those situations, which makes little sense. In China, parents are given their children in hotel lobbies. It is all rushed and a bit chaotic. All of this is prior to the actual adoption. Are these procedures supposed to apply in China and abroad? I don't think so. The Department needs to clarify this and look at how an agency is suppose to follow all these rules when the child and parents are 10,000 miles away.

This is another situation where domestic regulations are being applied to very specific foreign situations. The Department needs to just get granular. It's not that hard.

Subpart G—Decisions on Applications for Accreditation or Approval

No comments.

Subpart H—Renewal of Accreditation or Approval

No comments.

Subpart I—Routine Oversight by Accrediting Entities

No comments.

Subpart J—Oversight Through Review of Complaints

This is the most important section in all of the regulations. The publication of complaints will finally allow parents to judge agencies not by their prices, but by their behavior.

It is unclear whether this section limits those parents who may complain to only that short list in 96.41. If so, then parents who have completed an adoption are barred from complaining, since it only lists *prospective adoptive parents.* I do not think that is what the Department intended.

Will the information in 96.71 (2)(c) be available to the public through a FOIA request? If the public does not know about complaints, then how can they protect themselves and make an informed decision?

96.72 limits action by the accrediting entity to complaints that show a pattern. How many is a pattern? The problems could be different in the complaints and the agency might argue it is not a pattern, yet they have a lot of complaints. The accrediting entity should report to the Secretary and make its investigation public of every complaint. Waiting for a "pattern," whatever that is, guts the complaint procedure.

Subpart K—Adverse Action by the Accrediting Entity

No comments.

Subpart L—Oversight of Accredited Agencies and Approved Persons by the Secretary

No comment.

Subpart M—Dissemination and Reporting of Information by Accrediting Entities

The information disclosed in 96.91 should be made available through email upon request. A person in Iowa should not have to

go to the reading room to receive this information. Information on who has been accredited and who has been rejected should be posted on the Department's web site. This is just rudimentary. I should not have to file a FOIA, scan it in, and then post it to my own web site for the public to have access to this information.

Information about complaints in 96.92 has to be more than date of the complaint and whether it was substantiated. Parents should not be forced to rely on the accrediting entity to decide for them whether a complaint is serious or not. If they have the gist of the complaint that includes the problem and the region of the foreign country and the agency's response, then they can decide. They do not need names of the people involved. If the Department is not planning to disclose this information, it will see FOIAs repeatedly filed.

Will the information conveyed to the Secretary in 96.93 be available to the public? Again this is the sort of information parents will find useful in evaluating agencies.

I have no further comments on these regulations.